

In re) Fair Hearing No. B-01/10-16
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 Appeal of)

The petitioner appeals the decision by the Department for Children and Families, Child Development Division, finding two violations of the Early Childhood Program Licensing Regulations.¹ The Department bases its decision upon their December 10, 2009 site visit. The issue is whether the petitioner violated the pertinent regulations on the day of the site visit. The decision is based upon the evidence adduced at hearing.

1. The petitioner operates an Early Childhood Program.
2. N.T-D. is a licensing field specialist for the Department. N.T-D. has been a licensing field specialist since March 2007. Prior to her employment with the Department, she was a director of an early childhood program for thirteen years. She has a B.A. in elementary education

¹ The petitioner is not appealing a third violation. In addition, two violations were downgraded to observations as part of the Commissioner's Review.

with an early childhood concentration and twenty credits towards a Masters degree in early childhood education.

N.T-D. performs eight site visits per week except for the three-month period she was on leave. The purpose of the site visit is to determine whether the facility is in compliance with the licensing regulations.

3. On December 10, 2009, N.T-D. performed a site visit of petitioner's facility along with J.D'E., a Department licensing field specialist. J.D.'E. is on medical leave and is unavailable for hearing.

4. N.T-D. observed the infant's room. There were two staff members, J.O. and B. There is a u-shaped table with six molded bucket seats for the children to sit in. N.T-D. observed two children at the table. J.O. was changing diapers in the back of the room. B was preparing food in the microwave. There was nothing for the children to do at the table. N.T-D. observed that food was not offered until six minutes after she entered the room. Other children were placed at table. One child, N, was the first child at the table and the last fed. N.T-D. said N appeared upset and was grabbing food but the staff did not see this. N.T-D. stated that N's needs were not being met while sitting and waiting

for food. As a result, she cited the petitioner with a violation of Regulation I.B.1.

5. N.T-D. did not observe the room for the one-year-old children. J.D'E. observed the actions in the one-year-old room and cited petitioner with a violation of Regulation I.A.2. N.T-D. was part of the debriefing between J.D'E. and P.T., director, on December 10, 2009.

J.D'E. observed an art project in which the teaching assistant called up one child at a time to the table to do the project. The project involved gluing on cotton balls and paper to make a snowman. N.T-D.'s understanding is that one teaching assistant sat at the table and called each child up to the table individually to do the project and that the teaching assistant directed the project.

N.T-D. explained that they did not consider the project developmentally appropriate. She explained that it would be appropriate to have the children working on the project at the same time and that the project should be free form with the children doing more of the artwork. She said that art projects should be sensory and large scale such as finger painting. It was N.T-D.'s understanding that the snowmen looked the same; she said it is not appropriate for all the snowmen to look the same.

6. J.O. is a teaching associate employed by petitioner. She has worked for petitioner since October 2008. She is the head teacher in the infant's room. She worked with developmentally disabled children in a developmental facility from 1984-1988. She has a background as a physical therapist assistant. J.O. has college credits relating to her work as a teaching associate.

7. J.O. was in the infant's room with B on December 10, 2009. She indicated that it was an unusual day because many of the children were ready to eat at the same time. Ordinarily, the children eat at different times. B was preparing food. J.O. was in the back of the room changing diapers and washing the infant's hands to get the children ready for lunch. As each child was cleaned up, the child was placed in a molded seat at the table. J.O. stated that once a child's hands were washed, she could not put the child on the floor because that would contaminate the child's hands.

J.O. stated that two of the children were self-eaters. They gave food to these children first. J.O. stated that she saw N. D-T. come into the room. N was at the table; she is an expressive child. J.O. said that she did not feel there was a problem in how they dealt with the situation that morning.

8. P.T. is the director and has been employed by petitioner for ten years. She has worked in different childcare programs for seven years before going to work for petitioner. She is also the head pre-school teacher. She was present on December 10, 2009. She has an Associates Degree through the CCV apprenticeship program.

P.T. kept the back door of her room open. From that doorway, she could look across the hall and see into the one-year-old room. P.T. said several of the children were crying. She explained that several of the children were teething (their one year old molars) and they had permission slips from three or four parents to administer analgesics for the pain. She approached the classroom to ask the staff members whether everything was okay and was told the children were teething. There were two teaching assistants in the room. Because of the circumstances with the children, P.T. thought doing a project one on one was a good way to handle the children's needs.

P.T. observed two to three children do the project. R, a teaching assistant, was sitting at the table to work with each child. The other teaching assistant was comforting the other children. Glue had been placed on the construction paper. Cottons balls and paper pieces were available. The

children placed the cotton balls and small pieces of paper on the construction paper. The children determined where to place the cotton balls and paper pieces. Each child determined how long to spend on the project; time ranged from two to five minutes per child.

P.T. said that the process was important. Working with the cotton balls and paper was sensory. She felt that the children's needs would not be met doing the project at the same time given the number of children crying and fussing. She felt that doing the project one on one met the children's needs and was developmentally appropriate. She said that 80 percent of the time the children did their projects together.

9. The petitioner submitted a picture of the snowmen. The project is on a bulletin board. The children's snowmen are not the same.

ORDER

The Department's decision is reversed in part and affirmed in part.

REASONS

The CDD promulgated regulations governing the operation of Early Childhood Programs to ensure the quality of care for children and the protection of children. To enforce the regulations, the CDD conducts site visits. The site visit

gives the CDD a sense of how the particular program conducts itself. If a licensing violation is found, the CDD informs the Early Childhood Program. Notice of violations are posted on the CDD website providing information to parents or guardians of children.

Here, the petitioner has appealed two licensing violations. In a fair hearing, the Department has the burden of proof to show by a preponderance of evidence that a program's action rises to the level of a license violation. The Board grants deference to the CDD in its interpretation of their regulations. Fair Hearing No. R-10/09-571.

The CDD based the licensing violations on two regulations, Reg. No. IB1 and Reg. No. IA2.

Regulation No. IB1.

Reg. No. IB1 states:

The program shall be designed to meet the strengths, interests and needs of each child.

The parties do not dispute that N.T-D. observed N sitting at the table for six minutes before being fed and they do not dispute that N was fussy. They do dispute context and whether there is a violation.

J.O. testified that they faced an unusual situation in that the six infants in their care were hungry at the same

time rather than the normal situation of one or two infants eating at a time. Two of the infants were self-feeders; the other four infants needed assistance by staff to eat. Reg. V.5 states that infants are to be fed based on their individual needs. Reg. V.G.4 mandates that children's hands shall be washed prior to eating. In addition, the diapering policy calls for the child's hands to be washed after diapering.

N.T-D. based the violation on her conclusion that N's needs were not met due to the time she was sitting at the table with nothing to do, being fussy, grabbing food (not witnessed by staff), and the time, six minutes, it took to give her food. J.O. described a Catch-22 situation in which they did the best they could under the circumstances of maintaining hygiene, preparing food, and readying six children for their meal. No one described how the staff could have done better under the circumstances.²

Based on the competing regulatory demands and the above facts, the Department has not met its burden of proof that a violation occurred.

² The Commissioner's Review of April 7, 2010 notes that this incident was not sufficiently debriefed at the end of the site visit and that technical assistance may be helpful.

Regulation No. IA2

Reg. No. IA2 states:

The program and curriculum shall provide developmentally appropriate activities, equipment and materials in sufficient quantity and variety to meet the needs and interests of children being served.

On December 10, 2009, two teaching assistants handled the one-year-old room. Having the two teaching assistants handle this room alone without assistance from a teaching associate is not permitted under the regulations. On this particular day, a number of the children were teething and upset. The teaching assistants made a decision to do the art project with one child at a time. P.T., the director, observed two or three children do the project and concurred with her staff. It appears that P.T. did not observe the classroom at the same time as J.D'E., the licensing field specialist.

J.D'E. is on medical leave. Although N.D-T. did not observe the one-year-old room, she took part in the debriefing between J.D'E. and P.T. and was privy to the CDD's information in this case.

The project involved putting cotton balls and cut paper on a glued construction paper. The finished products do look different.

N.T-D. has significant expertise in early childhood education. She explained the need for children to work on the project independently but during the same time period. She explained the project should be free form and large-scale sensory activity.

The CDD's interpretation of developmentally appropriate activities should be given weight, and this violation should be upheld.

Conclusion

Based on the above, the Department's decision to cite a violation of Reg.I.B.1 is reversed and downgraded to an observation, and the Department's decision to cite a violation of Reg.I.A.2 is upheld. 3 V.S.A. § 3091(d), Fair Hearing Rule No. 1000.4D.

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